

ST 97-49

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
SPRINGFIELD, ILLINOIS**

**THE DEPARTMENT OF REVENUE
OF THE STATE OF ILLINOIS**

v.

**JOHN DOE
as responsible officer of
XYZ CORPORATION**

)
) **Docket #**
) **IBT #**
) **NPL #**
)
) **Linda Olivero**
) **Administrative Law Judge**
)

RECOMMENDATION FOR DISPOSITION

Appearances: Charles Hickman, Special Assistant Attorney General, for the Department of Revenue of the State of Illinois; Joseph E. McMenamin of Dunn & McMenamin for JOHN DOE.

Synopsis:

The Department of Revenue ("Department") issued a Notice of Penalty Liability ("NPL") to JOHN DOE ("respondent") pursuant to section 13½ of the Retailers' Occupation Tax Act ("ROTA"),¹ as it is incorporated into the Motor Fuel Tax Law (Ill.Rev.Stat., ch. 120, par. 434a). The NPL alleges that the respondent was an officer or employee of XYZ CORPORATION ("corporation") who was responsible for willfully failing to pay the corporation's motor fuel taxes ("MFT"). The respondent timely protested the NPL. An evidentiary hearing was held during which the respondent raised

¹. Section 13½ of the ROTA has been replaced by section 3-7 of the Uniform Penalty and Interest Act (35 ILCS 735/3-7).

the following issues: (1) whether the Department issued the NPL within the statute of limitations; and (2) whether the respondent willfully failed to pay the MFT. After reviewing the record, it is recommended that this matter be resolved in favor of the Department.

Findings of Fact:

1. The corporation was in the business of selling motor fuel at wholesale and operating a service station and convenience store. (Tr. p. 14)

2. The respondent was the president of the corporation. (Tr. p. 55)

3. The respondent admitted that he was the officer of the corporation who was responsible for filing the motor fuel tax returns and paying the taxes to the Department. (Tr. p. 15)

4. The corporation ceased operations on January 31, 1992. (Tr. pp. 22-23)

5. On February 21, 1992, the respondent filed a motor fuel tax return on behalf of the corporation for the month of January 1992 showing total tax due of \$16,070.55. The tax was not remitted with the return. (Respondent Ex. #1)

6. On March 10, 1992, the corporation filed a Chapter 7 bankruptcy petition. (Respondent Ex. #7)

7. The corporation's check register for January 1992 for the bank account at Farmers State Bank of FICTITIOUS CITY shows deposits totaling \$81,076.58. (Respondent Group Ex. #9)

8. On February 21, 1995, the Department issued NPL number XXXX to the respondent that proposed a total penalty liability of \$23,591.19, which includes a tax of \$15,990.36, penalty of \$1,599.04 and interest of \$6,001.79, for failure to pay MFT for the month of January 1992. The NPL was admitted into evidence under the certification of the Director of the Department. (Dept. Ex. #1)

9. On January 29, 1996, the Department received a check in the amount of \$2,488.96 as payment towards the respondent's account. (Respondent Ex. #6; Tr. p. 45)

Conclusions of Law:

The respondent first argues that the NPL should be dismissed because the Department did not issue it within the statute of limitations. Section 13½ of the ROTA provides in relevant part as follows:

“[N]o notice of penalty liability shall be issued *** after the expiration of 3 years after the date any return is filed with the Department by a corporation in cases where the return constitutes the basis of such liability.” Ill.Rev.Stat., ch. 120, par. 452½.

The respondent had previously filed a motion to dismiss in which he raised the same issue. In his motion, the respondent argued that the 3 year time period ended on February 20, 1995, and because the NPL was issued the next day, it was untimely. The motion was denied in an order entered on May 23, 1996. Now the respondent argues that the NPL was not actually placed in the mail on February 21, 1995, and therefore it was untimely.

The respondent presented the following facts concerning this issue. The NPL contains a certification of service that was signed by DEPARTMENT EMPLOYEE indicating that on February 21, 1995 she mailed the NPL “by placing [it] in a properly addressed and stamped envelope, *** and *** by mailing the same at the United States Post Office located at Springfield, Illinois to be delivered by Certified Mail, Return Receipt Requested” (Dept. Ex. #1). The respondent testified that he received the NPL on February 24, 1995 (Tr. p. 30). In June of 1996, the respondent requested that the Department produce the receipt for the certified mail concerning the NPL (Respondent Ex. #11). The Department responded by stating that the receipt had been destroyed because it is the policy of the Department to retain those documents for only one year (Respondent Ex. #12). Also, in response to an interrogatory concerning the Department’s mailing procedures related to this NPL, the Department stated that DEPARTMENT EMPLOYEE placed the NPL “in the ‘certified mail’ out tray located in the Control Unit of the Collection Bureau. Mailroom personnel picked up the document.” (Respondent

Group Ex. #4, p. 5). In addition, the respondent testified that in July and August of 1997, his attorney sent him certified mail from Springfield, Illinois on three separate dates, and the respondent received all of the mail the day after it was sent. (Tr. pp. 34-36; Respondent Group Ex. #5).

Under section 13½, the Department's certified record relating to the penalty liability constitutes *prima facie* proof of the correctness of the penalty due. See Branson v. Department of Revenue, 168 Ill.2d 247, 260 (1995).² Once the Department presents its *prima facie* case, the burden shifts to the respondent to overcome this presumption of validity. Id. at 261; Clark Oil & Refining Corp. v. Johnson, 154 Ill.App.3d 773, 783 (1st Dist. 1987). In this case, the Department's *prima facie* case was established when the Department's certified record relating to the penalty liability was admitted into evidence. In response, the respondent argues that the Department failed to issue the NPL within three years because it is not likely that the NPL was placed in the mail on February 21, 1995. The respondent states that contrary to the certification of service, the Department admitted that DEPARTMENT EMPLOYEE merely put the document into the mail tray rather than in the mailbox at the post office. Also, the respondent claims that certified mail sent from Springfield, Illinois normally takes only one day to reach the respondent's residence in FICTITIOUS CITY, Illinois, not three days like it took in this case. The respondent therefore argues that the NPL could not have been issued on February 21, 1995.

². The relevant portion of section 13½ provides as follows: "The Department shall determine a penalty due under this Section according to its best judgment and information, and such determination shall be *prima facie* correct and shall be *prima facie* evidence of a penalty due under this Section. Proof of such determination by the Department shall be made at any hearing before it or in any legal proceeding by reproduced copy of the Department's record relating thereto in the name of the Department under the certificate of the Director of Revenue. Such reproduced copy shall, without further proof, be admitted into evidence before the Department or any legal proceeding and shall be *prima facie* proof of the correctness of the penalty due, as shown thereon." Ill.Rev.Stat., ch. 120, par. 452½.

The respondent has the burden of proving the Department's *prima facie* case is incorrect, but the respondent has presented nothing, other than speculation, showing the NPL was not issued on February 21, 1995. First, this issue was previously raised in a motion to dismiss, and at the hearing on the motion the respondent argued that the NPL was issued on February 21, 1995. After losing the motion, the respondent asked the Department for the receipt for the certified mailing. If the respondent had requested the receipt within a year after the NPL was issued, the Department could have provided it. In addition, the respondent did not provide the envelope that the NPL was sent in, which would have shown the date that it was mailed. Although the respondent normally receives certified mail from Springfield in one day, there could be a number of reasons why the NPL in this case reached the respondent three days after it was issued. For example, the post office may have been behind on delivering mail, or the respondent may not have been home to sign for the mail earlier than February 24, 1995. In addition, during the hearing the respondent admitted that the NPL might have been placed in the mail on February 21, 1995 if the Department's employee had put it in the mail tray early in the morning. (Tr. p. 71) In other words, the respondent's arguments are based on speculation concerning what might have occurred, and the respondent has failed to present evidence showing that the NPL was not issued on February 21, 1995.

Next, the respondent argues that he did not willfully fail to pay the MFT and therefore should not have to pay the penalty liability. Section 13½ of the ROTA provides in part as follows:

"Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who wilfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon;" Ill.Rev.Stat., ch. 120, par. 452½.

An officer or employee of a corporation may therefore be personally liable for the corporation's taxes if (1) the individual had the control, supervision or responsibility of filing the returns and paying the taxes, and (2) the individual willfully failed to perform these duties.

As previously stated, the Department's *prima facie* case was established when the Department's certified record relating to the penalty liability was admitted into evidence. In response, the respondent does not argue that he was not the responsible corporate officer; he admitted during his testimony that he was responsible for filing and paying the MFT for the corporation. The respondent contends, however, that his failure to pay the MFT was not willful.

For guidance in determining the meaning of "willful" under section 13½, the Illinois Supreme Court has referred to cases interpreting section 6672 of the Internal Revenue Code (26 U.S.C. §6672).³ See Branson at 254-56; Department of Revenue v. Heartland Investments, Inc., 106 Ill.2d 19, 29-30 (1985). These cases define willful as involving intentional, knowing and voluntary acts or, alternatively, reckless disregard for obvious known risks. Id. Willful conduct does not require bad purpose or intent to defraud the government. Branson at 255; Heartland at 30. Willfulness may be established by showing that the responsible person (1) clearly ought to have known that (2) there was a grave risk that the taxes were not being paid and (3) the person was in a position to find out for certain very easily. Wright v. United States, 809 F.2d 425, 427 (7th Cir. 1987). Furthermore, whether the person in question willfully failed to pay the taxes is an issue of fact to be determined on the basis of the evidence in each particular case. Heartland at 30; Department of Revenue v. Joseph Bublick & Sons, Inc., 68 Ill.2d 568, 577 (1977).

³. This section imposes personal liability on corporate officers who willfully fail to collect, account for, or pay over employees' social security and Federal income withholding taxes.

In the present case, the respondent did not provide sufficient evidence indicating that the failure to pay the taxes was not willful. The respondent had access to the corporation's books and records, and he knew that the corporation was having financial difficulties. During the month of January 1992, sufficient deposits were made to the corporation's account to pay the tax liability. Although the respondent argues that he did not know what his tax liability would be until February of 1992, the liability for the taxes attached at the time that they were collected. See Anderson v. United States, 855 F.Supp. 236, 238 (N.D. Ill. 1994). The responsible person has a duty to keep the withheld taxes in trust from the day that the taxes are withheld, regardless of the due date of the tax return. Id. In addition, if the responsible person knowingly uses available funds to pay other creditors, then he has acted willfully. Id.; Heartland at 29-30. The respondent has therefore failed to show that his actions were not willful.

Recommendation

For the foregoing reasons, it is recommended that the Notice of Penalty Liability be upheld.

Linda Olivero
Administrative Law Judge

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